

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>SCOTT GURTEN</b>	:	<b>CIVIL ACTION</b>
	:	
vs.	:	<b>NO. 17-1841</b>
	:	
<b>JEFF SESSIONS, et al.</b>	:	

**ORDER-MEMORANDUM**

**AND NOW**, this 31<sup>st</sup> day of October 2017, upon considering the parties' Cross Motions for Summary Judgment (ECF Doc. Nos. 20, 22) and Responses (ECF Doc. Nos. 26, 27), it is **ORDERED** the Cross Motions (ECF Doc. Nos. 20, 22) are **DENIED** as there are genuine issues of material fact which preclude us from finding, as a matter of law, whether the underlying convictions are serious crimes warranting disqualification of the Second Amendment right to keep and bear arms.

***Analysis***

Congress is presently disqualifying Scott Gurten under 18 U.S.C. § 922 (g)(1) from his Second Amendment rights because of a conviction based on November 7, 2005 conduct with materially different stories of what happened. The disqualification applies to serious crimes when the government can show a compelling government interest. Based on his view of his November 7, 2005 conduct, Mr. Gurten sued the Attorney General seeking we declare § 922 (g)(1) is unconstitutional as applied to him. Absent a trial record or guilty plea colloquy, we cannot determine whether his November 7, 2005 conduct constitutes a serious crime.

Before November 2005, Scott Gurten owned a firearm with a license to carry it.<sup>1</sup> The

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<sup>1</sup> Joint Appx. at 15. Where the parties cross move summary judgment, our Policies require a joint Bates stamped appendix of exhibits. The parties filed a Joint Appendix at ECF Doc. No. 19.

license expired before November 7, 2005.<sup>2</sup> On November 7, 2005, the Philadelphia Police arrested Mr. Gurten and the District Attorney charged him with aggravated assault, carrying firearms without a license, carrying firearms in public in Philadelphia, possessing instruments of crime, terroristic threats, and simple assault.<sup>3</sup> Mr. Gurten pleaded guilty to carrying a firearm without a license, carrying a firearm in public, and simple assault.<sup>4</sup> The sentencing judge classified Mr. Gurten's convictions for carrying a firearm without a license and carrying a firearm in public as misdemeanors in the first degree punishable by up to five years imprisonment and his simple assault conviction as a misdemeanor in the second degree punishable by up to two years imprisonment.<sup>5</sup> The state court judge sentenced Mr. Gurten to probation for three years, twenty hours of community service, and court costs for his carrying firearms without a license conviction and gave him no further penalty on his other two convictions.<sup>6</sup> Mr. Gurten later attempted to purchase a firearm but the Pennsylvania State Police informed him 18 U.S.C. § 922(g)(1) prohibits him from purchasing a firearms based on his convictions for carrying a firearm without a license and carrying a firearm in public.<sup>7</sup>

The issues before us require focusing on whether the underlying convictions are serious crimes under Pennsylvania law disqualifying Mr. Gurten from keeping a firearm. Absent a trial

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at 1-2, 21-22.

<sup>4</sup> *Id.* at 21. Mr. Gurten's convictions are codified at 18 Pa.C.S. § 6106, 18 Pa.C.S. § 6108, and 18 Pa.C.S. § 2701.

<sup>5</sup> *Id.* at 91.

<sup>6</sup> *Id.* at 91-92.

<sup>7</sup> *Id.* at 91.

record, guilty plea colloquy or any admitted facts regarding the actual crime, we today are left with two different versions of the events on the night of November 7, 2005.

In the light most favorable to Mr. Gurten, the mother of his children, Tracy Scarlota, had taken them to an unknown location and she had problems with drug and alcohol use.<sup>8</sup> Mr. Gurten learned of Ms. Scarlota's whereabouts and he, Mr. Scarlota (Ms. Scarlota's father), Ian Dougherty (Ms. Scarlota's brother-in-law), and Nick Blank went to the location to retrieve the children.<sup>9</sup> The four men arrived at the apartment and found the children.<sup>10</sup> Mr. Scarlota and Mr. Dougherty took the children and left.<sup>11</sup> When Mr. Gurten and Mr. Blank went to leave, Ms. Scarlota and a man, Lee, emerged from the bathroom and verbal and physical confrontation ensued.<sup>12</sup> Mr. Gurten may have pushed Ms. Scarlota when trying to exit the apartment but did not hit her.<sup>13</sup> Mr. Gurten and Mr. Blank drove away in Mr. Gurten's truck where Mr. Gurten's firearm had remained throughout the entire confrontation.<sup>14</sup> They returned to Mr. Blank's house where Mr. Gurten called the police and then the police arrived "with guns on us" responding to Ms. Scarlota's call, not his call.<sup>15</sup> The police officers arrested Mr. Gurten.<sup>16</sup>

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<sup>8</sup> *Id.* at 7.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 9.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 9-10.

<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 9.

<sup>16</sup> *Id.* at 11.

In a light most favorable to the United States, Mr. Gurten went to the apartment where he believed Ms. Scarlota resided with their two children.<sup>17</sup> When Mr. Gurten arrived at the apartment building, he saw an individual who had just been in the apartment with Ms. Scarlota and Lee.<sup>18</sup> Mr. Gurten told the individual he was going to Lee's apartment and then the individual also went towards the same apartment with Mr. Gurten.<sup>19</sup> The individual saw Mr. Gurten pull up his shirt to reveal he had a gun then called into the apartment, "[i]t's enough, it's over."<sup>20</sup> Mr. Gurten then went into the apartment and then pointed his gun at Ms. Scarlota and Lee who were in the bathroom and physically pulled Ms. Scarlota out of the bathroom.<sup>21</sup> Mr. Gurten either punched Ms. Scarlota with his fist or hit her with his gun and knocked her down.<sup>22</sup> Mr. Gurten then took the children and left the apartment.<sup>23</sup>

Mr. Gurten sued Attorney General Jeffery Sessions and Acting Director of the Bureau of Alcohol Tobacco and Firearms Thomas E. Brandon (collectively the "United States"). He seeks us to declare § 922(g)(1) is unconstitutional as applied to him because he did commit a serious crime which historically disqualifies an individual from Second Amendment rights. Mr. Gurten moves for summary judgment arguing there is no dispute of material fact § 922(g)(1) as applied

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<sup>17</sup> *Id.* at 1.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; Declaration of Tracy Scarlota, ECF Doc. No. 27-1, ¶ 5.

<sup>23</sup> Joint Appx. 1.

to him is unconstitutional because his disqualifying convictions are not serious crimes and the United States does not show § 922(g)(1) as applied to him serves a compelling government interest. The United States cross moves for summary judgment arguing Mr. Gurten's disqualifying convictions are for serious crimes, and even if we find they are not serious crimes, it satisfied its burden of showing § 922(g)(1) as applied to Mr. Gurten serves a compelling government interest.

To succeed in an as applied challenge to § 922(g)(1), Mr. Gurten must satisfy the two prongs of the *Marzzarella* test, including the two hurdles of the first prong of *Marzzarella*.<sup>24</sup> The first prong of *Marzzarella* requires Mr. Gurten to show § 922(g)(1) to identify the traditional justifications for excluding individuals who commit crimes punishable by imprisonment for more than one year under § 922(g)(1) and then to distinguish his conviction from the “historically barred class.”<sup>25</sup> If Mr. Gurten satisfies the first prong, the United States then must show § 922(g)(1) as applied to Mr. Gurten satisfies intermediate scrutiny.<sup>26</sup>

**A. Mr. Gurten identifies the traditional justification for barring persons under §922(g)(1) from possessing a firearm.**

Clearing the first hurdle is easy for Mr. Gurten thanks to *Binderup*, where our court of appeals undertook a detailed review of the historical justifications for denying the right to keep and bear arms to individuals who committed a crime punishable by imprisonment for more than

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<sup>24</sup> See *Binderup v. Attorney General United States of America*, 836 F.3d 336, 351 (3d Cir. 2016), *cert. denied sub nom. Sessions v. Binderup*, 137 S. Ct. 2323 (2017), and *cert. denied sub nom. Binderup v. Sessions*, 137 S. Ct. 2323 (2017) (citing *United States v. Marzzarella*, 614 F.3d 85 (3d Cir. 2010)).

<sup>25</sup> *Id.* at 346.

<sup>26</sup> *Id.* at 355.

a year, the common law definition of a felon.<sup>27</sup> Our court of appeals found “[m]ost scholars of the Second Amendment agree that the right to bear arms was tied to the concept of a virtuous citizenry and that, accordingly, the government could disarm ‘unvirtuous citizens.’”<sup>28</sup>

While individuals who commit or are likely to commit violent crimes are “undoubtedly” unvirtuous citizens, historically the definition of unvirtuous citizen is “broader” also including individuals who commit non-violent serious offenses “forfeit the right to possess firearms.”<sup>29</sup> Our court of appeals concluded the historical justification denying individuals the right to keep and bear arms under § 922(g)(1) is they “committed serious crimes.”<sup>30</sup>

**B. Disputed facts preclude summary judgment distinguishing Mr. Gurten’s conviction from the historically barred class under 922(g)(1).**

For his second hurdle, Mr. Gurten must now distinguish his disqualifying conviction, carrying a firearm without a license and carrying a firearm in public, from the serious crimes of the traditional “unvirtuous” citizens who lacked the right to keep and bear arms.<sup>31</sup> Mr. Gurten must show his disqualifying conviction it was not a serious crime, in other words he was never

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.* (citing *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010); see, e.g., Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 *FORDHAM L. REV.* 487, 491–92 (2004); Saul Cornell, “Don’t Know Much about History”: *The Current Crisis in Second Amendment Scholarship*, 29 *N. KY. L. REV.* 657, 679 (2002); David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 *MICH. L. REV.* 588, 626–27 (2000); Glenn Harlan Reynolds, *A Critical Guide to the Second Amendment*, 62 *TENN. L. REV.* 461, 480 (1995); Don B. Kates, Jr., *The Second Amendment: A Dialogue*, *LAW & CONTEMP. PROBS.*, Winter 1986, at 143, 146; Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 *MICH. L. REV.* 204, 266 (1983).

<sup>29</sup> *Id.* at 348-49.

<sup>30</sup> *Id.* at 349.

<sup>31</sup> *Id.*

convicted of a serious crime, and cannot satisfy this hurdle with evidence of rehabilitation or the passage of time since his conviction.<sup>32</sup> We cannot decide, as a matter of law, whether Mr. Gurten's disqualifying convictions are for serious crimes because there are genuine disputes of material fact regarding his conduct precluding summary judgment.

In *Binderup*, our court of appeals held Congress' prohibition unconstitutional as applied to two individuals whose convictions for misdemeanors punishable by more than two years imprisonment because their convictions were not for serious crimes which historically disqualify an individual from Second Amendment rights.<sup>33</sup> Most germane to our analysis is underlying conduct which led to their disqualifying convictions is not disputed and non-violent. Mr. Binderup's disqualifying conviction for corrupting a minor is based on his consensual sexual relationship with a seventeen year old employee and he had no other contemporaneous convictions.<sup>34</sup> Mr. Suarez's conviction is for carrying a handgun without a license discovered by police when they stopped him for driving while intoxicated and while it is unclear if he also has a conviction for driving while intoxicated, he does not dispute this characterization.<sup>35</sup>

Mr. Gurten's disqualifying convictions largely track Mr. Suarez's conviction, two state law misdemeanors punishable by more than two years imprisonment for carrying a gun in public

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<sup>32</sup> *Id.* at 349-50.

<sup>33</sup> See *Binderup v. Attorney General United States of America*, 836 F.3d 336, 351 (3d Cir. 2016), *cert. denied sub nom. Sessions v. Binderup*, 137 S. Ct. 2323 (2017), and *cert. denied sub nom. Binderup v. Sessions*, 137 S. Ct. 2323 (2017).

<sup>34</sup> *Id.* at 340; see also *id.* at 375 (Hardiman, J. concurring in part and concurring in judgment) (noting there is no evidence Mr. Binderup's sexual relationship involved implicit or genuine violence and "[s]uch facts would make his a much different case").

<sup>35</sup> *Id.* at 340; see also *id.* at 376 (Hardiman, J. concurring in part and concurring in judgment) (noting the nonviolent nature of [Mr.] Suarez's offense is evident as well").



and carrying an unlicensed weapon. Where they diverge is while Mr. Suarez's conduct was undisputedly nonviolent, Mr. Gurten's conduct leading him to plead guilty those misdemeanors and simple assault is hotly disputed. There are genuine disputes of material fact as to Mr. Gurten's underlying conduct as to whether Mr. Gurten used violence on November 7, 2005. As bizarre as it seems when Mr. Gurten possibly pleaded guilty to avoid a trial, we will determine based upon credibility of witnesses whether Mr. Gurten used violence. We cannot determine whether Mr. Gurten's disqualifying convictions are serious crimes as a matter of law where the United States adduced evidence, if believed, Mr. Gurten may have used his gun to hit Ms. Scarlota while his children were inside the same apartment. We understand we will, in essence, try the events of November 7, 2015. In the absence of trial records or a plea colloquy, however, we must hear evidence to satisfy ourselves Mr. Gurten's conduct was not violent before we can possibly find, as a matter of law, his convictions were not serious crimes. We find our court of appeals would require this finding before disqualifying Second Amendment rights.

We accordingly must deny both parties' motions for summary judgment.

  
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KEARNEY, J.